VENABLE LLP

575 SEVENTH STREET NW WASHINGTON, DC 20004
T 202.344.4000 F 202.344.8300 www.Venable.com

Lawrence H. Norton
T 202.344.4541
F 202.344.8300
lhnorton@venable.com

August 23, 2016

VIA ELECTRONIC MAIL

Jeff S. Jordan
Assistant General Counsel
Complaints Examination & Legal Administration
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 7024 – Response on behalf of Wilmer Cutler Pickering Hale and Dorr LLP

Dear Mr. Jordan:

This letter is submitted on behalf of our client, Wilmer Cutler Pickering Hale and Dorr LLP ("WilmerHale"), in response to the complaint ("Complaint") filed by Cause of Action Institute with the Federal Election Commission ("FEC" or "Commission) in Matter Under Review ("MUR") 7024.

The Complaint does not name WilmerHale as a respondent. Rather, we understand that WilmerHale is being provided an opportunity to respond in light of certain allegations regarding its work that are made in the Complaint.[1] The Complaint alleges, in essence, that WilmerHale provided in-kind and excessive contributions to the campaign of Representative Christopher Van Hollen, Jr. ("Van Hollen") in the form of pro bono legal services. The alleged "contributions" relate to WilmerHale's pro bono representation of Van Hollen in connection with a 2011 lawsuit challenging the Commission's regulations interpreting the electioneering communication provisions of the Federal Election Campaign Act ("FECA" or the "Act") as amended by the Bipartisan Campaign Reform Act ("BCRA").

As explained below, WilmerHale's pro bono legal services are not contributions regulated by FECA because the services were neither provided to a political committee nor provided for the purpose of influencing any election for federal office. Rather, WilmerHale's services consist of

[1] The Commission provided WilmerHale with notice of the Complaint and an opportunity to respond several months after notice was provided to Democracy 21 and CLC. The July 21, 2016 letter providing such notice stated that this was due to an administrative oversight.

work in support of legal filings challenging generally applicable campaign finance laws unrelated to a specific election. As such, they fall squarely within a 40-year, bipartisan tradition through which Members of Congress have both challenged and defended campaign finance laws and regulations. Here, as in these prior cases, any conceivable benefit to a Member's campaign is purely incidental. Accordingly, the Commission should find no reason to believe that WilmerHale violated the Act and dismiss the Complaint.

I. Background

WilmerHale is a full-service international law firm organized as a limited liability partnership with over 900 attorneys.[2] Since 2011, Roger Witten and other WilmerHale attorneys have represented Van Hollen in his individual capacity in connection with *Van Hollen v. FEC*, a federal lawsuit challenging Commission regulations governing disclosure of donors by persons making electioneering communications.[3] The lawsuit is currently on appeal to the United States Court of Appeals for the District of Columbia Circuit.

The Complaint names Democracy 21 and the Campaign Legal Center ("CLC") as respondents and accuses them, in addition to WilmerHale, of providing prohibited in-kind contributions to Van Hollen in the form of pro bono legal services. The arguments set forth in the Democracy 21 and CLC response, filed on their behalf by WilmerHale, apply equally to the pro bono services provided to Van Hollen by WilmerHale itself, and are hereby incorporated by reference and included with this response as Exhibit B.

II. *Pro Bono Publico*: WilmerHale's Longstanding Commitment to Serve the Public Good Through Free Legal Services

Pro bono representation is part of the storied history of the American legal tradition. Lawyers have a professional responsibility to provide pro bono legal services by, in the words of the ABA Model Rules, participating in "activities for improving the law, the legal system or the legal profession."[4] Justice Sandra Day O'Connor explained that seeking to serve the community as a whole, and not just individual clients for profit, is a crucial aspect of being a lawyer and sets the legal profession apart from other businesses:

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[2] Witten Aff. ¶ 3; *About the Firm*, WILMERHALE.COM, https://www.wilmerhale.com/about/overview/ (last visited Aug. 17, 2016).

[3] Witten Aff. ¶¶ 6-8; *Van Hollen v. FEC*, No. 11-cv-00766 (D.D.C.), Nos. 15-5016, 5017 (D.C. Cir.).

[4] *See* MODEL RULES OF PROFESSIONAL CONDUCT, r. 6.1(b)(3), "Voluntary Pro Bono Publico Service;" (AM. BAR ASS'N).

> [P]ublic service marks the difference between a business and a profession. While a business can afford to focus solely on profits, a profession cannot. It must devote itself first to the community it is responsible to serve. I can imagine no greater duty than fulfilling this obligation. And I can imagine no greater pleasure.[5]

As former Attorney General Eric Holder noted: "I . . . believe that the privilege of earning a law degree, and living a life in the law, comes with a condition—an ongoing obligation to advance the cause of justice and the rule of law."[6]

WilmerHale's history of pro bono services stretches back to the foundation of legal aid early in the twentieth century.[7] Since then, WilmerHale attorneys have consistently distinguished themselves as leaders in pro bono representation. The firm's pro bono efforts span a wide range of public issues and interests, including domestic and international human rights; housing and homelessness policy; veterans' health care services; children's mental health services; the death penalty; racial and sexual orientation discrimination; religious freedom; and election and campaign finance regulation.[8]

The firm's pro bono representation of Van Hollen is but the latest example of the firm's 40-year commitment to defending the role of campaign finance regulation in the healthy functioning of our nation's democracy—activity that is squarely within the American legal tradition of *pro bono publico*. Mr. Witten's involvement in defending the constitutionality and implementation of FECA dates back to 1975 and the seminal case of *Buckley v. Valeo*—decades before Van Hollen was first elected to Congress.[9] Mr. Witten and other WilmerHale attorneys have since that time

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[5] Justice Sandra Day O'Connor, "Professionalism," 78 Or. L. Rev. 385, 391 (1999).

[6] Attorney General Eric Holder, Address Before the Pro Bono Institute (March 19, 2010) (transcript available at https://www.justice.gov/opa/speech/attorney-general-eric-holder-addresses-pro-bono-institute).

[7] *About the Firm*, WILMERHALE.COM, https://www.wilmerhale.com/about/overview/ (last visited Aug. 17, 2016); *Pro Bono Efforts*, WILMERHALE.COM, https://www.wilmerhale.com/probono/#!1 (last visited Aug. 17, 2016). As Justice Ginsburg puts it:

> Roots of what came to be called "poverty law" and a major alert to the need for "legal aid" trace to one of Boston's oldest law firms, Hale and Dorr. In 1919, Reginald Heber Smith, a partner at that firm, published Justice and the Poor, a groundbreaking study of how the economically disadvantaged fare in U.S. legal systems. Smith exposed vast differences in the quality of justice available to the rich and the poor. His exposé led to endeavors to narrow the gap, including the establishment of the first national legal aid organization (National Association of Legal Aid Organizations).

Justice Ruth Bader Ginsburg, In Pursuit of the Public Good: Lawyers who Care, Remarks before the University of the District of Columbia David A. Clarke School of Law (April 9, 2001) (transcript available at https://www.supremecourt.gov/publicinfo/speeches/sp_04-09-01a html).

[8] Witten Aff. ¶¶ 4-6; *Pro Bono Efforts*, WILMERHALE.COM, https://www.wilmerhale.com/probono/#!1 (last visited Aug. 17, 2016).

[9] Witten Aff. ¶ 5. Representative Van Hollen was first elected in 2002. *About Chris*, CONGRESSMAN CHRIS VAN HOLLEN, https://vanhollen house.gov/about-chris (last visited Aug. 17, 2016).

represented elected officials from both sides of the aisle in major cases involving FECA's constitutionality and Commission regulations, including *McConnell v. FEC*, *Shays I, II, and III*, *Citizens United*, and now *Van Hollen v. FEC.*[10]

III. WilmerHale's Pro Bono Legal Services Were Not Provided for the Purpose of Influencing an Election

A. WilmerHale's Pro Bono Legal Services Consisted of Legal Filings and Related Litigation, not Express Advocacy or Fundraising for Van Hollen's Election

The Act defines the term "contribution" to include: "any gift, subscription, loan, advance, or deposit of money or anything of value made by a person for the purpose of influencing any election for Federal office . . ."[11] While neither Congress nor the Commission have explicitly defined the term "for the purpose of influencing any election for Federal office,"[12] the Commission has consistently recognized that not everything of value is provided for the purpose of influencing an election.

Rather, the Commission first applies a two-part test for determining the contributor's intent, namely whether (1) the donation or activity involves express advocacy for a candidate's election or (2) the activity solicits funds to support the candidate's election.[13] Here, the litigation consisted of legal filings and arguments, not express advocacy or the solicitation of funds for Van Hollen's re-election.

[10] Witten Aff. ¶ 5-6; *McConnell v. FEC*, 540 U.S. 93 (2003); *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) ("Shays I"); *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) ("Shays II"); *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("Shays III"); *Citizens United v. FEC*, 558 U.S. 310 (2010).

[11] 52 U.S.C. § 30101(8)(A)(i).

[12] In the context of independent political advertisements, the term has been limited to communications that expressly advocate the election or defeat of a clearly identified candidate. *See Buckley v. Valeo*, 424 U.S. 1, 46-47 (1976).

[13] *Orloski v. FEC*, 795 F.2d 156, 163 (D.C. Cir. 1986) (affirming the Commission's conclusion that "[u]nder the Act this type of 'donation' is only a 'contribution' if it first qualifies as an 'expenditure' and, under the FEC's interpretation, such a donation is not an expenditure unless someone at the funded event expressly advocates the reelection of the incumbent or the defeat of an opponent or solicits or accepts money to support the incumbent's reelection."); *see also* AO 1994-15 (Byrne) (applying *Orloski* test and concluding that financing the production and broadcasting of a monthly public issues television program hosted by a Member of Congress is not a contribution); AO 1978-04 (John Rhodes Commemorative Committee) (concluding that tickets for an event honoring a Member of Congress are not contributions so long as the event does not include solicitation of contributions or express advocacy messages).

In fact, the federal court complaint's only reference to Van Hollen's status as a candidate is his assertion of interest in participating in elections where the sources of electioneering communications are fully disclosed. As a consequence, he claims, the Commission's electioneering communications regulations cause him Article III injury.[14] As explained more fully in the response filed by Democracy 21 and CLC, these jurisdictional allegations simply do not bear on the question of whether a person has engaged in activity for the purpose of influencing an election.

B. The Litigation Stems from Van Hollen's Role as a Member of Congress

In the absence of express advocacy for a candidate's election or a solicitation, the Commission applies an objective test, considering the totality of the circumstances to determine whether a donor intended to influence a particular election. If the "activity in question . . . appear[s] to have *any specific and significant non-election related aspects* that might distinguish it from election influencing activity," then the activity is not for the purpose of influencing an election.[15]

The Commission has long recognized that "events in which Federal officeholders participate in the performance of their duties as officeholders are not campaign-related simply because the officeholders may be candidates for election to Federal office, and that payments associated with the expenses of such events are not contributions to that officeholder's campaign, absent any campaign-related activity at that event."[16] For example, the Commission has held that the donation of goods or services related to a policy event hosted by a Member of Congress in his or her district was not for the purpose of influencing an election, even though some incidental benefit may accrue to that officeholder's candidacy.[17] Similarly, the Commission concluded in MUR 4395 that President Clinton's official travel to South Korea and Russia in 1996 was not campaign-related, even though the Commission recognized that such trips could engender political goodwill with voters. And in MUR 1790, the Commission likewise concluded that President Reagan's travel to give a speech before a convention of Veterans of Foreign Wars was not campaign-related, even though the speech occurred the day after he was officially nominated. In each of these cases, the Commission concluded that the activities in question had "specific and significant non-election related aspects."[18]

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[14] Complaint at 4, *Van Hollen v. FEC*, 851 F. Supp. 2d 69 (D.D.C. 2012).

[15] AO 1983-12 (National Conservative PAC) at 4 (emphasis added).

[16] AO 1994-15 (Byrne).

[17] AO 1978-04 (John Rhodes Commemorative Committee).

[18] MUR 4395 (Clinton/Gore '96 Primary Committee, Inc.); MUR 1790 (Reagan-Bush '84); AO 1983-12 (National Conservative PAC) at 4.

Likewise, Van Hollen's legal challenge is an exercise of his role as a Member of Congress who supports the robust enforcement of campaign finance laws as a matter of policy. The Complaint acknowledges as much, identifying Van Hollen as "the leading force in the U.S. House of Representatives for campaign finance reform."[19] Van Hollen himself is the only plaintiff in the lawsuit, and his campaign committee was not a party and had no involvement in the proceeding. Moreover, WilmerHale does not represent Van Hollen's campaign committee for any purpose.[20]

WilmerHale's legal services to Van Hollen are of a piece with the cases discussed above: any political benefit attributable to the litigation is at most incidental to Van Hollen's challenge to the validity of a regulation with which he disagrees. Complainant seizes on a press release issued by Van Hollen's congressional office (not his campaign committee) concerning his participation in the litigation, but this only underscores that robust donor disclosure is one of Van Hollen's policy priorities, and thus is a "specific and significant non-election related aspect" of the litigation. The unremarkable fact that campaign finance reform is also an issue in Van Hollen's re-election campaign does not transform the litigation into campaign activity.

C. Pro Bono Legal Services Are Not Contributions Absent a Clear Nexus with Voters' Choices in a Particular Election

Pro bono legal representation, like any other in-kind service, is "[some]thing of value." But to be considered a contribution the legal services must also be for the purpose of influencing a federal election. The Commission has never found pro bono legal services to be a contribution merely because the recipient is a candidate. Quite the opposite: the Commission has concluded that candidates may receive free legal services so long as the representation is not for the purpose of influencing the candidate's election.

Of course, pro bono legal services that directly benefit the individual candidacy itself—and which lack any specific and significant non-election-related purpose—may, under certain circumstances, be a contribution. For example, a lawsuit by a candidate seeking to disqualify the candidate's opponent from the ballot was for the purpose of influencing an election.[21] So, too, was the pro bono representation of a candidate seeking to silence an electoral opponent through a defamation suit and state-level false advertising claims.[22] These pro bono representations were

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[19] Complaint, ¶ 3, n. 1, *quoting* Josh Israel, *EXCLUSIVE INTERVIEW: Rep. Chris Van Hollen On Campaign Finance, Election Reform*, THINK PROGRESS, Nov. 21, 2012, http://goo.gl/bfvlav.

[20] Witten Aff. ¶ 8.

[21] AO 1980-57 (Bexar) at 2 ("A candidate's attempt to force an election opponent off the ballot so that the electorate does not have an opportunity to vote for that opponent is as much an effort to influence an election as is a campaign advertisement derogating that opponent.").

[22] MUR 6494 (Schmidt).

deemed contributions because the subject matter of the proceeding went to the conduct of a particular election and had no significant non-election-related purpose. Moreover, in the latter case, services were specifically undertaken on behalf of the candidate *and* her campaign committee such that they were also deemed contributions under 52 U.S.C. § 30101(8)(A)(ii), which has no application here.[23]

That is not the case here. The Commission has repeatedly determined that there is no "contribution" in supporting a legal proceeding that does not bear on the conduct of a particular election. For example, the Commission has concluded that the financing of a reapportionment challenge is not a "contribution," even though the "reapportionment plan may have political features."[24] The Commission distinguished such litigation from a challenge instituted by one candidate to disqualify another from the ballot because the latter has a direct effect on voters' choices. Similarly, the Commission has concluded that the financing of a suit challenging ballot access thresholds was not a contribution because the suit was "a condition precedent to the candidate's participation in the primary election," and not the candidate's attempt to prevent the electorate from voting for a particular opponent.[25]

If anything, WilmerHale's litigation work for Van Hollen is even further removed from the outcome of a particular election than the cases involving reapportionment and ballot access. Van Hollen's legal challenge to a generally applicable law does not seek to foreclose voters' choices or influence a particular election. Indeed, the federal court complaint and other pleadings make no reference to Van Hollen's fitness or qualifications for public office or the fitness and qualifications of his opponent. Put simply, the legal services provided by WilmerHale did not seek to prevent any candidate from obtaining access to the ballot and were not aimed at influencing a particular election. Accordingly, under the Commission's precedents, they were not "for the purpose of influencing an election."[26]

D. The Long History of Candidates Receiving Pro Bono Representation to Challenge Campaign Finance Laws Demonstrates Approval from Congress and the Commission

Pro bono challenges to federal campaign finance laws on behalf of U.S. Senators and Representatives are as old as the laws themselves, tracing back to the seminal case of *Buckley v.*

[23] *Id.*

[24] AO 1981-35 (Thomas) at 2.

[25] AO 1982-35 (Hopfman) at 2.

[26] *See, e.g., Orloski*, 795 F.2d at 163-64.

Valeo.[27] Far from being a relic of the past, though, pro bono representation in campaign finance cases has grown more prevalent in recent years. No fewer than seven U.S. Senators or Representatives—from both chambers of Congress and both major political parties—participated in the *McConnell* litigation with pro bono legal assistance.[28]

Congress is keenly aware that its Members have received pro bono representation for the last 40 years in connection with campaign finance law challenges. In connection with BCRA's passage in 2002, the Senate reaffirmed and expanded a resolution previously adopted in 1996 that permits a Senator to receive pro bono representation to challenge the constitutionality of a statute—directly or as an intervenor—if the statute itself affords judicial review to Members of Congress.[29] Both FECA and BCRA afford Members of Congress the right to seek judicial review; in fact, the 2002 resolution was sponsored by the very Senators who were the Plaintiff and Defendant-Intervenors in the *McConnell* litigation.

Complainants fail even to acknowledge this long history or the specific congressional actions approving it, let alone offer any reason to depart from it here. There is no basis for doing so as a matter of law, and if the Commission were inclined to so depart and identify this longstanding practice as a violation, it would be manifestly unfair to do so in the context of an enforcement matter. Rather, the appropriate course would be to consider the matter through notice-and-comment rulemaking.

IV. Conclusion

The crux of the Complaint—that pro bono legal services provided to Van Hollen provided an incidental benefit to his campaign, and therefore the services are a contribution—is contrary to Commission precedent and would subvert the prominent role of bipartisan, pro bono representation in cases throughout the post-Watergate era, including such landmark cases as *Buckley*, *McConnell*, and *Citizens United*. In addition, the legal standard advocated by Complainant would invite complaints about virtually any activity that places a candidate in what

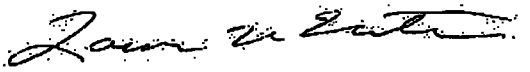
[27] Senator Buckley and his co-plaintiff, Senator McCarthy were represented pro bono. Ralph K. Winter, Jr., *The History and Theory of* Buckley v. Valeo, 6 J. L. Pol'y 93 (1997).

[28] Senator McConnell challenged the constitutionality of BCRA with the pro bono support of several lawyers. On the other side, Senators McCain and Feingold, as well as Representatives Shays and Meehan, intervened as defendants and were represented by Roger Witten and other WilmerHale attorneys. Witten Aff. ¶ 5.

[29] S. Res. 227, 107th Congress (Mar. 20, 2002), *available at* https://www.congress.gov/bill/107th-congress/senate-resolution/227/text (extending the authorization of pro bono legal services to Members who both challenge or seek to defend through intervention the validity of a federal statute); S. Res. 321, 104th Congress (Oct. 3, 1996), *available at* https://www.congress.gov/bill/104th-congress/senate-resolution/321/text ("Authorizing the acceptance of pro bono legal services by a Member of the Senate challenging the validity of a Federal Statute in a civil action pursuant to a statute expressly authorizing Members of Congress to bring such a civil action.").

may be perceived as a positive light, ranging from community involvement to support for charities and social causes to the routine practice of filing amicus briefs in court. For the foregoing reasons, the Commission should find no reason to believe that WilmerHale violated the Act and dismiss the complaint.

Respectfully submitted,



Lawrence H. Norton
William A. Powers
Janice M. Ryan

Enclosures:

Exhibit A – Affidavit of Roger M. Witten
Exhibit B – MUR 7024 Response of Respondents Democracy 21 and The Campaign Legal Center

EXHIBIT A

BEFORE THE FEDERAL ELECTION COMMISSION

IN RE:	)	
CHRISTOPHER VAN HOLLEN, JR.,	)	
DEMOCRACY 21,	)	MUR 7024
THE CAMPAIGN LEGAL CENTER,	)	
Respondents.	)	

AFFIDAVIT OF ROGER M. WITTEN,
WILMER CUTLER PICKERING HALE AND DORR LLP

I, ROGER M. WITTEN, state the following:

1. My name is Roger M. Witten. I am over the age of eighteen.

2. I am a Senior Counsel at Wilmer Cutler Pickering Hale and Dorr LLP ("WilmerHale"). I joined WilmerHale's predecessor (Wilmer, Cutler & Pickering) in 1975 and became a partner in 1980. I serve on the Board of Democracy 21 and the Board of the Campaign Legal Center, respondents in this matter.

3. WilmerHale is organized as a limited liability partnership. The firm has over 900 attorneys providing legal representation across a comprehensive range of practice areas.

4. WilmerHale has consistently distinguished itself as a leader in pro bono representation. Many of our lawyers have played, and continue to play, prominent roles in public service activities of national and international importance.

5. During my time at WilmerHale, I have personally provided pro bono legal representation in many significant federal campaign finance law matters before the FEC and in

court, alongside numerous other WilmerHale attorneys. I served as pro bono counsel representing intervening defendants, Center for Public Financing of Elections and the League of Women Voters of the United States in *Buckley v. Valeo*, 424 U.S. 1 (1976) (I note that plaintiff Buckley, then a U.S. Senator, received pro bono representation in that case). I served as pro bono counsel representing Senators McCain (R-AZ) and Feingold (D-WI) and Representatives Shays (R-CT) and Meehan (D-MA) in *McConnell v. FEC*, 540 U.S. 93 (2003) (I note that defendant McConnell, then a U.S. Senator, received pro bono representation in that case). I served as pro bono counsel representing Representatives Shays (R-CT) and Meehan (D-MA) in *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) ("*Shays I*"); 414 F.3d 76 (D.C. Cir. 2005) ("*Shays II*"); and 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III*"). I served as pro bono counsel representing Senators McCain (R-AZ) and Feingold (D-WI), and then-former Representatives Shays (R-CT) and Meehan (D-MA) in connection with *amicus curiae* briefs filed in *Citizens United v. FEC*, 558 U.S. 310 (2010). My professional activities relating to campaign finance law also include chairing the Twentieth Century Fund Working Group on Campaign Finance Litigation, which published a report entitled *Buckley Stops Here: Loosening the Judicial Stranglehold on Campaign Finance Reform* (1998), and serving as Chairman of the Election Law Committee of the Section of Administrative Law and Regulatory Practice of the American Bar Association from 1988 to 1990. Prior to joining WilmerHale, I served as an Assistant Special Prosecutor on the Watergate Special Prosecution Force where I worked on the investigation and prosecution of campaign finance law violations.

6. I serve as counsel and am responsible for the filings in *Van Hollen v. FEC*, No. 11-cv-00766 (D.D.C.), Nos. 15-5016, 5017 (D.C. Cir.) on behalf of Representative Christopher Van Hollen, Jr. ("Rep. Van Hollen"). Other WilmerHale attorneys have worked on this matter,

including Partner Catherine M.A. Carroll, who currently serves as lead counsel for Rep. Van Hollen in the ongoing litigation before the United States Court of Appeals for the District of Columbia Circuit. WilmerHale did not provide services to Rep. Van Hollen in connection with the 2011 rulemaking petition he filed with the Federal Election Commission seeking to revise the Commission's regulations relating to disclosure of independent expenditures.

7. WilmerHale's participation in this matter is limited to providing Rep. Van Hollen with pro bono legal services to challenge agency interpretation of generally applicable campaign finance laws. In the firm's capacity as pro bono counsel to Rep. Van Hollen it is not, and was not, the firm's purpose, nor was it within the scope of the firm's representation of him, to seek to influence the outcome of any particular election.

8. During the course of my participation in these matters, WilmerHale's client has been Rep. Van Hollen and no other person or entity. The firm represents him personally and not as a candidate. The firm does not and never has represented Rep. Van Hollen's campaign committee in connection with these or any other matters. All of my and WilmerHale's dealings on these matters were with Rep. Van Hollen and his congressional staff, and there were no dealings with his campaign committee or campaign staff. All of my and WilmerHale's communications with Rep. Van Hollen and his congressional staff related exclusively to the litigation, and WilmerHale has had no communications with them about Rep. Van Hollen's election campaign.

9. The sole purpose for which WilmerHale was retained was to challenge the relevant FEC regulation in court. WilmerHale engaged in this representation for that sole purpose, as I and others at the firm have done in numerous campaign finance cases for three

decades. WilmerHale had nothing whatsoever to do with Rep. Van Hollen's election campaign and it was not WilmerHale's purpose or intent to do so.

I swear that the above statement is true and correct to the best of my knowledge.

ROGER M. WITTEN

August 23, 2016

Date

Subscribed to and sworn before me
this 23rd day of August, 2016.

Notary Public

My commission expires:

June 16, 2019

LEES A PATRIACCA
Notary Public, State of New York
No. 01PA5040311
Qualified in New York County
Commission Expires ~~March~~ June 16, 2019

EXHIBIT B

BEFORE THE FEDERAL ELECTION COMMISSION

IN RE:	
CHRISTOPHER VAN HOLLEN, JR.,	
DEMOCRACY 21,	
THE CAMPAIGN LEGAL CENTER,	**MUR 7024**
Respondents.	

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RESPONSE OF RESPONDENTS DEMOCRACY 21 AND THE CAMPAIGN LEGAL CENTER

Christopher E. Babbitt
Adam Raviv
Kurt G. Kastorf
Arpit K. Garg*
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
Tel: (202) 663-6000
Fax: (202) 663-6363

Attorneys for Democracy 21 and The Campaign Legal Center

* Admitted to practice only in New York. Supervised by members of the firm who are members of the District of Columbia bar.

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CHRISTOPHER VAN HOLLEN, JR.,	
DEMOCRACY 21,	
THE CAMPAIGN LEGAL CENTER,	**MUR 7024**
Respondents.	

RESPONSE OF RESPONDENTS
DEMOCRACY 21 AND THE CAMPAIGN LEGAL CENTER

Respondents, Democracy 21 and The Campaign Legal Center ("CLC"), hereby request that the Federal Election Commission ("FEC" or the "Commission") find no reason to believe that Respondents violated the Federal Election Campaign Act of 1971 ("FECA") as alleged in the MUR 7024 Complaint.

INTRODUCTION

Since the FEC's founding, elected officials and advocacy groups have worked with attorneys on a pro bono basis to litigate structural challenges to the conduct of federal elections in the United States. In the seminal case of *Buckley v. Valeo*, lawyers worked pro bono to represent a group of plaintiffs that included elected officials and political parties.[1] More recently, in *McConnell v. FEC*, the current Senate Majority Leader relied on pro bono legal services to serve as the lead plaintiff in a challenge the Bipartisan Campaign Reform Act

[1] Ralph K. Winter, Jr., *The History and Theory of* Buckley v. Valeo, 6 J. L. & POL'Y 93, 93 (1997).

(BCRA).[2] That such litigation may have provided a reputational benefit to the elected officials did not convert these pro bono legal services into a "contribution" under the FECA. Indeed, as a general matter, federal elected officials regularly engage in litigation on matters of public concern—either as parties or supporting amici—using pro bono legal services, and such services have not been subject to the contribution limits in FECA, notwithstanding any potential reputational benefit to the official.[3]

Consistent with this established practice, Democracy 21 and CLC provided pro bono representation to Rep. Christopher Van Hollen, Jr. ("Van Hollen") in a 2011 lawsuit and rulemaking petition, taking the position that existing FEC regulations are contrary to law because they allow certain organizations to keep secret the donors whose funds are being used for election-influencing activity. No one could have been surprised by the involvement of these organizations in litigation or rulemaking on these issues. Democracy 21 and CLC appear frequently before the FEC and the courts, including in many of the most significant campaign-finance cases over the past fifteen years, and they have established track records of litigating over generally applicable election laws and regulations. They are non-partisan organizations that have never endorsed or supported a candidate for office. The pro bono services challenged here were consistent with—and part of—the organizations' longstanding advocacy for greater transparency in federal campaign finance laws.

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[2] Nick Anderson, *Starr Will Help Fight Finance Reform*, L.A. TIMES, Mar. 22, 2002, *available at* http://articles.latimes.com/2002/mar/22/news/mn-34161 (reporting that Kenneth W. Starr, Floyd Abrams, and Kathleen M. Sullivan provided pro bono legal services to Sen. McConnell).

[3] *See, e.g.*, Christian Newswire, *Members of Congress File Amicus Curiae Brief with U.S. Supreme Court Addressing Illegality of 'Revenue Raising' Obamacare Originating in Senate* (Dec. 2, 2015), http://christiannewswire.com/news/3077577104.html (Forty-six United States Representatives relied on pro bono legal services to file an amicus brief in *Sissel v. Dep't Health & Human Services*, No. 15-543 (U.S. cert. denied Jan. 19, 2016); Press Release, *Alaska Delegation Files Supreme Court Amicus Brief in Support of John Sturgeon Case* (Nov. 23, 2015), http://donyoung.house.gov/news/documentsingle.aspx?DocumentID=398544 (Senator Lisa Murkowski, Senator Dan Sullivan, and Representative Don Young relied on pro bono legal services to file an amicus brief in *Sturgeon v. Frost*, No. 14-1209 (U.S. rev'd Mar. 22, 2016)).

Cause of Action Institute and its Executive Director (collectively "Cause of Action") now argue that Democracy 21 and CLC's provision of pro bono legal services in support of their longstanding mission of reforming campaign finance laws should be treated as an impermissible campaign contribution to Van Hollen. Because Cause of Action can point to no evidence that Democracy 21 and CLC's purpose was to further Van Hollen's House or Senate campaigns (it emphatically was not), Cause of Action instead asks the Commission to adopt a new standard under which services would be treated as contributions subject to FECA if they may confer any indirect benefit—such as reputational enhancement—on a particular candidate or campaign, irrespective of the intent of the donor. Cause of Action's sweeping theory would be unworkable in practice and would effectively outlaw the longstanding practice of using pro bono legal services in structural challenges to campaign finance laws and regulations as well as other cases involving public policy.

Because there is no support in FECA, Commission regulations, or the Commission's past practice to support an investigation into this Complaint, the FEC should find no reason to believe that Democracy 21 and CLC violated the Act and should take no further action in this matter.

SUMMARY OF ARGUMENT

The pro bono legal services at issue here are not "contributions" under FECA. The statute provides two alternate definitions of "contribution"—either (i) anything of value for the purpose of influencing a federal election or (ii) a payment to a political committee for any purpose. The services here meet neither definition.

First, the services were not rendered for the purpose of influencing any election for Federal office. Pro bono legal services provided for structural challenges to the legality and

interpretation of generally applicable campaign finance laws do not seek to influence the outcome of any particular Federal election. As such, they are analogous to challenges to reapportionment plans or litigation over ballot access rules, both of which the Commission has determined are not subject to FECA.

Even if *some* pro bono services might, under certain circumstances, qualify as contributions, there is no question that the pro bono services at issue here contain none of the indicia that serve to identify activity that is for the purpose of influencing a Federal election. These activities involved neither express advocacy nor campaign solicitations—the clearest indicia of election-influencing "contributions" under Commission precedent. Moreover, the public record clearly establishes (and Cause of Action fails to allege otherwise) that Democracy 21 and CLC's purpose in providing legal services was to further their longstanding and well-established interests in promoting campaign finance reform, not to influence a particular election in which Van Hollen was a candidate. The rulemaking and litigation each had a clear "non-election related aspect"—seeking administrative or judicial relief to require greater donor disclosure in campaign finance regulations—which distinguishes them from election-influencing activities.

Cause of Action's arguments for why these pro bono services are "contributions" rest on an erroneous theory of indirect benefit. Its principal argument—that any activity providing reputational benefit to a candidate is a "contribution"—is squarely foreclosed by the Commission's past opinions. Its alternative argument—based on Van Hollen's standing-related allegations about how the regulation at issue could potentially affect him—fails to recognize crucial differences between standing in federal court and a "contribution" under FECA. And, as

noted above, accepting Cause of Action's erroneous indirect-benefit theory would be both highly disruptive and unworkable in practice.

Second, the pro bono legal services were not a payment to a political committee because they were given directly to Van Hollen, not his campaign committee. Cause of Action has no basis for alleging otherwise.

ARGUMENT

I. DEMOCRACY 21 AND CLC'S PRO BONO LEGAL SERVICES WERE NOT A "CONTRIBUTION" AS DEFINED UNDER § 8(A)(I) OF FECA

The gravamen of Cause of Action's complaint is that pro bono legal services are a "contribution" because they may indirectly benefit a federal candidate. That argument relies on the first part of the statutory definition of a "contribution," which encompasses "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person *for the purpose of influencing any election for Federal office*." 52 U.S.C. § 30101(8)(A)(i) (emphasis added; hereinafter "§ 8(a)(i)"). But a proper understanding of the emphasized language demonstrates that the pro bono legal services in this case were not performed "for the purpose of influencing any election for Federal office." Accordingly, they are not contributions under § 8(a)(i).

A. Structural Challenges To Generally Applicable Campaign Finance Laws And FEC Regulations Are Not "For the Purpose Of Influencing" Federal Elections

The Commission has distinguished between generally applicable structural challenges to campaign laws unrelated to a specific election and litigation designed to assist only a specific campaign. It has declined to treat supporting services for the former as "contributions," notwithstanding any indirect benefit the litigation may confer on a particular candidate. This

distinction is reflected in the Commission's advisory opinions related to reapportionment of House seats and challenges to primary-qualification rules, both of which the Commission has determined to be outside the scope of the Act because they are not undertaken "for the purpose of influencing any election for Federal office." § 8(a)(i).

In FEC advisory opinion 1981-35, the Commission addressed whether the financing of reapportionment litigation was a "contribution" under § 8(a)(i). The Commission recognized that "[e]ssential aspects of the Federal election process are ... dependent on [reapportionment] decisions" and thus "[a]ttempts to influence a state legislature's decisions on reapportionment plans may have political features." Nevertheless, it concluded that such attempts and "litigation which relates to reapportionment decisions" "are not necessarily election-influencing activity of the type subject to" FECA. The Commission specifically distinguished such litigation from challenges "instituted by one candidate to disqualify an opposing candidate from the election ballot," which the FEC had previously ruled was a contribution (FEC AO 1980-57) because it "represented an effort to deny the electorate the opportunity to vote for the opposing candidate" and was therefore "for the purpose of influencing an election." By contrast, "[t]he influencing of reapportionment decisions of a state legislature, although a political process, is not considered election-influencing activity subject to the requirements of [FECA]."

In FEC advisory opinion 1982-14, the Commission reaffirmed that conclusion. The Michigan Republican State Committee—an organization ordinarily engaged in election-influencing activity—sought to create a segregated fund to receive and disburse funding to influence (and potentially legally challenge) Michigan's 1980 congressional reapportionment. Notwithstanding the organization's purpose and function, the Commission ruled that such funding was not a contribution. It reiterated that "[t]he influencing of reapportionment decisions

of a state legislature, although a political process, is not subject to the requirements of the [FECA]."

In FEC advisory opinion 1982-35, the Commission confronted a similar question regarding a political party's primary-ballot access rule. The Massachusetts Democratic Party required a candidate to receive 15% of the votes cast at the party's convention to challenge the party's endorsed candidate on the primary election ballot. A prospective Democratic candidate for federal election (who could meet the state-law petition requirement but not the party-specific 15% rule) wanted to raise money to bring a constitutional challenge to the party rule, and asked the Commission whether such funding was a contribution under FECA. The Commission ruled that it was not. The candidate was not "attempting to influence a Federal election by preventing the electorate from voting for a particular opponent" but rather "propos[ing] to use the judicial system to test the constitutionality of the application of the party rule to his candidacy." Because the lawsuit was "in this case, a condition precedent to the candidate's participation in the primary election," his activity to raise funds for such litigation was "outside the purview of the [FECA.]"

If challenges to reapportionment plans or party primary-qualification rules within a particular state are not contributions within the Act, notwithstanding the "political features" inherent in such challenges (AO 1981-35), it follows *a fortiori* that neither a petition for a nationally applicable rulemaking nor litigation that seeks nationwide relief are contributions either. In fact, the Commission's prior advisory opinions addressed challenges with far more immediate political impact than those at issue here. For example, the lawsuit addressed in AO 1982-35 directly determined a candidate's ability to participate in a particular election. Here, the rulemaking and lawsuit are not "condition[s] precedent" to Van Hollen's personal participation in a particular campaign; rather, they concern the rules that apply to *all* candidates in *all* federal

elections. The nature of the effect of the underlying lawsuit and rulemaking proceeding on any specific candidate or election is far more indirect than in the redistricting and primary-qualification challenges, which the Commission concluded were outside the scope of FECA.

As in the primary-qualification challenge, Van Hollen's lawsuit has sought to "use the judicial system to test" the legality of the campaign-finance laws. FEC AO 1982-35. That effort—and, in particular, Democracy 21 and CLC's involvement—have not supported his election (or any particular election) directly; rather, the lawsuit was a challenge to the "illegal structuring of a competitive environment." *Shays v. FEC*, 414 F.3d 76, 85 (D.C. Cir. 2005). And challenges to election structure are not "election-influencing activity of the type subject to the Act and regulations." FEC AO 1981-35.

B. Neither Democracy 21 Nor CLC Provided Legal Services For The Purpose Of Influencing Van Hollen's Election

The Commission need not adopt a categorical rule that pro bono campaign-finance legal services are never contributions under § 8(a)(i) to dismiss the complaint, because it is plain that the purpose of the specific legal services that Cause of Action challenges was not to influence an election. The intent of the donor is crucial because the statutory language in § 8(a)(i) looks to the "purpose" of the donation. In evaluating whether an activity qualifies as a "contribution," the Commission thus squarely rejected a test based solely on the effects of the activity and instead required affirmative evidence of the donor's intent to influence a specific election:

> [A]lthough media or other public appearances by candidates may benefit their election campaigns, the person defraying the costs of such an appearance will not be deemed to have made a contribution in-kind to the candidate absent an indication that such payments are made to influence the candidate's election to Federal office.

AO 1982-56. *See also* AO 1992-06 (citing 1982-56); 1992-05 (same); 1986-06 (same); 1985-38 (same).

1. Neither Democracy 21 nor CLC undertook activities involving express advocacy or solicitation intended to influence Van Hollen's election

The Commission first applies a two-part test for determining donor intent. Funding an activity is not a "contribution" under this test "if (1) there is an absence of any communication expressly advocating the nomination or election of the congressman appearing or the defeat of any other candidate, and (2) there is no solicitation, making, or acceptance of a campaign contribution for the congressman in connection with the event." *Orloski v. FEC*, 795 F.2d 156, 160 (D.C. Cir. 1986); *see also, e.g.*, FEC AO 1996-11; 1994-15; 1992-6; 1992-05; 1988-27. Neither part of this test is satisfied here: The litigation and petition for rulemaking consisted of legal filings, not express advocacy for Van Hollen's election or a campaign contribution solicitation. Those facts are sufficient to conclude that neither Democracy 21 nor CLC made a "contribution" under § 8(a)(i).

2. The "totality of the circumstances" does not compel a different result

In the absence of express advocacy or a solicitation, the Commission may go beyond the two-part test to determine intent (*see, e.g.*, AO 1994-15), considering the totality of circumstances to assess whether an activity would be objectively perceived as an intentional attempt to influence an election (*see, e.g.*, AO 1990-05). But no objective observer could conclude that Democracy 21 and CLC acted with the purpose of influencing Van Hollen's election under the totality of the circumstances here.

Democracy 21 and CLC are election-law reform organizations with an extensive history of working to strengthen the country's generally applicable election laws and regulations, both

through administrative proceedings and through litigation. *See* FEC AO 1983-12 ("The purpose and functions of an organizational entity are material and relevant to the Commission's characterization of the underlying purpose of a specific activity or program of that entity."). Democracy 21 and CLC's mission is to "promote[] campaign finance reform" by "eliminat[ing] the undue influence of big money in American politics" and "[w]orking in administrative, legislative and legal proceedings" to "attack laws and regulations that undermine the fundamental rights of all Americans to participate in the political process." Exhibit A; Exhibit B. Consistent with that mission, Democracy 21 and CLC have filed at least 65 sets of comments on FEC advisory opinion requests[4] and at least 32 sets of comments in FEC rulemakings[5] since

[4] Comments of Democracy 21 on AOR 2003-3 (Cantor) (April 22, 2003); Comments of Democracy 21 on AOR 2003-12 (April 21, 2003); Comments of Democracy 21 and Campaign Legal Center on AOR 2003-37 (Dec. 17, 2003) (Americans for a Better Country); Comments of Democracy 21 and Campaign Legal Center on AOR 2004-05 (February 12, 2004) (Americans Coming Together); Comments of Democracy 21 and Campaign Legal Center on AOR 2004-30 (Citizens United) (August 13, 2004); Comments of Democracy 21 and Campaign Legal Center on AOR 2004-31 (Darrow) (August 13, 2004); Comments of Democracy 21 and Campaign Legal Center on AOR 2004-35 (recounts) (Sept. 16, 2004); Comments of Democracy 21 and Campaign Legal Center on AORs 2004-38 and 2004-39 (recounts) (Oct. 25, 2004); Comments of Democracy 21 and Campaign Legal Center on AOR 2004-43 (Missouri Broadcasters) (December 15, 2004); Comments of Democracy 21 and Campaign Legal Center on AOR 2004-43 (Missouri Broadcasters) (OGC draft) (February 11, 2005); Comments of Democracy 21 and Campaign Legal Center on AOR 2004-45 (Salazar) (January 26, 2005); Comments of Democracy 21 and Campaign Legal Center on AOR 2005-13 (Emily's List) (Sept. 9, 2005); Comments of Democracy 21 and Campaign Legal Center on AOR 2005-16 (Fired Up) (Sept. 26, 2005); Comments of Democracy 21 and Campaign Legal Center on AOR 2005-16 (Fired Up) (OGC Draft) (Nov. 16, 2005); Comments of Democracy 21 and Campaign Legal Center on AOR 2006-10 (EchoStar) (March 10, 2006); Comments of Democracy 21 and Campaign Legal Center on AOR 2006-11 (Wash. State Party) (March 13, 2006); Comments of Democracy 21 and Campaign Legal Center on AOR 2006-19 (LACDP) (May 22, 2006); Comments of Democracy 21 and Campaign Legal Center on AOR 2006-19 (LACDP) (Supplemental Comments) (May 24, 2006); Comments of Democracy 21 and Campaign Legal Center on AOR 2006-14 (NRA) (June 21, 2006); Comments of Democracy 21 and Campaign Legal Center on AOR 2006-20 (Unity 08) (June 19, 2006); Comments of Democracy 21 and Campaign Legal Center on AOR 2006-20 (Unity 08) (Supplemental Comments) (Aug. 23, 2006); Comments of Democracy 21 and Campaign Legal Center on AOR 2006-24 (recounts) (Aug. 24, 2006); Comments of Democracy 21 and Campaign Legal Center on AOR 2006-24 (recounts (Supplemental Comments) (Oct. 3, 2006); Comments of Democracy 21 and Campaign Legal Center on AOR 2006-31 (Casey) (Oct. 2, 2006); Comments of Democracy 21 and Campaign Legal Center on AOR 2006-32 (PFAVF) (Oct. 10, 2006); Comments of Democracy 21 and Campaign Legal Center on AOR 2006-31 (Casey) (Supplemental Comments) (Oct. 12, 2006); Comments of Democracy 21 and Campaign Legal Center on AOR 2007-03 (Obama) (Feb. 20, 2007); Comments of Democracy 21 and Campaign Legal Center on AOR 2007-04 (Atlatl) (April 17, 2007); Comments of Democracy 21 and Campaign Legal Center on AOR 2007-09 (Kerry-Edwards) (July 2, 2007); Comments of Democracy 21 and Campaign Legal Center on AOR 2007-09 (Kerry-Edwards) (OGC Draft) (July 25, 2007); Comments of Democracy 21 and Campaign Legal Center on AOR 2007-11 (Calif. State parties) (July 5, 2007); Comments of Democracy 21 and Campaign Legal Center on AOR 2007-28 (McCarthy) (Nov. 5, 2007); Comments of Democracy 21 and Campaign Legal Center on AOR 2007-32 (SpeechNow.org) (Dec. 10, 2007); Comments of Democracy 21 and Campaign Legal Center on AOR 2007-33 (Club for Growth PAC) (Dec. 10, 2007); Comments of Democracy 21 and Campaign Legal Center on AOR 2007-28 (McCarthy) (Draft opinions) (Dec. 12, 2007); Comments of Democracy 21 and Campaign Legal Center on AOR 2008-09 (Lautenberg) (August 18, 2008); Comments of Democracy 21 and Campaign Legal Center on AOR 2008-14 (Melothe) (Sept. 29, 2008); Comments of Democracy 21 and Campaign Legal Center on AOR 2008-15 (NRLC) (Oct. 9, 2008); Comments of Democracy 21 and Campaign Legal Center on AOR 2008-15 (NRLC) (Draft opinions)

(Oct. 22, 2008); Comments of Democracy 21 and Campaign Legal Center on AOR 2009-04 (Franken) (Draft opinions) (March 18, 2009); Comments of Democracy 21 and Campaign Legal Center on AOR 2009-13 (Black Rock) (July 15, 2009); Comments of Democracy 21 and Campaign Legal Center on AOR 2009-13 (Black Rock) (Draft opinion) (July 27, 2009); Comments of Democracy 21 and Campaign Legal Center on AOR 2010-03 (redistricting) (March 15, 2010); Comments of Democracy 21 and Campaign Legal Center on AOR 2010-07 (Yes on FAIR) (April 27, 2010); Comments of Democracy 21 and Campaign Legal Center on AOR 2010-08 (Citizens United) (Draft opinions) (June 9, 2010); Comments of Democracy 21 and Campaign Legal Center on AOR 2010-20 (NDPAC) (Aug. 27, 2010); Comments of Democracy 21 and Campaign Legal Center on AOR 2011-9 (Facebook) (Draft opinions) (June 14, 2011); Comments of Democracy 21 and Campaign Legal Center on AOR 2011-11 (Colbert) (May 27, 2011); Comments of Democracy 21 and Campaign Legal Center on AOR 2011-12 (Majority PAC) (June 6, 2011); Comments of Democracy 21 and Campaign Legal Center on AOR 2011-21 (CCF) (Nov. 3, 2011); Comments of Democracy 21 and Campaign Legal Center on AOR 2011-23 (American Crossroads) (Nov. 14, 2011); Comments of Democracy 21 and Campaign Legal Center on AOR 2012-11 (Free Speech) (March 22, 2012); Comments of Democracy 21 and Campaign Legal Center on AOR 2012-14 (McCutcheon) (March 26, 2012); Comments of Democracy 21 and Campaign Legal Center on AOR 2012-19 (American Future Fund) (May 11, 2012); Comments of Democracy 21 and Campaign Legal Center on AOR 2012-25 (AFF) (Aug. 3, 2012); Comments of Democracy 21 and Campaign Legal Center on AOR 2012-27 (National Defense Committee) (Aug. 6, 2012); Comments of Democracy 21 and Campaign Legal Center on AOR 2012-32 (Tea Party) (Oct. 3, 2012); Comments of Democracy 21 and Campaign Legal Center on AOR 2013-04 (DGA) (July 8, 2013); Comments of Democracy 21 and Campaign Legal Center on AOR 2013-09 (SOS) (July 22, 2013); Comments of Democracy 21 and Campaign Legal Center on AOR 2013-10 (DSCC) (Aug. 2, 2013); Comments of Democracy 21 and Campaign Legal Center on AOR 2013-17 (TPLF) (Oct. 18, 2013); Comments of Democracy 21 and Campaign Legal Center on AOR 2013-17 (TPLF) (Draft opinions) (Nov. 20, 2013); Comments of Democracy 21 and Campaign Legal Center on AOR 2013-18 (Revolution Messaging) (Feb. 25, 2014); Comments of Democracy 21 and Campaign Legal Center on AOR 2014-12 (RNC and DNC) (Oct. 8, 2014); Comments of Democracy 21 and Campaign Legal Center on AOR 2015-09 (Senate Majority PAC) (Oct. 27, 2015).

[5] Comments of Democracy 21 on NPRM 2002-07 (soft money) (May 29, 2002); Comments of Democracy 21 on NPRM-13 (electioneering communications) (Aug. 21, 2009); Comments of Democracy 21 on NPRM 2002-14 (contribution limits); Comments of Democracy 21 on NPRM 2002-16 (coordination) (Oct. 11, 2002); Comments of Democracy 21 on NPRM 2002-28 (Leadership PACs) (Jan. 30, 2003); Comments of Democracy 21 on NPRM 2003-08 (public financing) (May 23, 2003); Comments of Democracy 21 on NPRM 2003-09 (enforcement policies) (May 30, 2003); Comments of Democracy 21 and Campaign Legal Center on NPRM 2004-06 (definition of "political committee") (April 5, 2004); Comments of Democracy 21 and Campaign Legal Center on NPRM 2004-17 (tax exempt organizations) (Jan. 7, 2005); Comments of Democracy 21 and Campaign Legal Center on NPRM 2005-03 (agents) (March 4, 2005); Comments of Democracy 21 and Campaign Legal Center on NPRM 2005-06 (solicitations) (March 28, 2005); Comments of Democracy 21 and Campaign Legal Center on NPRM 2005-10 (Internet) (June 3, 2005); Comments of Democracy 21 and Campaign Legal Center on NPRM 2005-12 (June 3, 2005); Comments of Democracy 21 and Campaign Legal Center on NPRM 2005-12 (state party salaries) (June 3, 2005); Comments of Democracy 21 and Campaign Legal Center on NPRM 2005-13 (federal election activity) (June 3, 2005); Comments of Democracy 21 and Campaign Legal Center on NPRM 2005-20 (electioneering communications) (Sept. 30, 2005); Comments of Democracy 21 and Campaign Legal Center on NPRM 2005-24 (solicit) (Oct. 28, 2005); Comments of Democracy 21 and Campaign Legal Center on NPRM 2005-28 (coordination) (Feb. 1, 2006); Comments of Democracy 21 and Campaign Legal Center on NPRM 2005-28 (coordination) (Supplemental comments) (Jan. 13, 2006); Comments of Democracy 21 and Campaign Legal Center on NPRM 2006-05 (coordination) (March 22, 2006); Comments of Democracy 21 and Campaign Legal Center on NPRM 2006-07 (federal election activity) (May 22, 2006); Comments of Democracy 21 and Campaign Legal Center on NPRM 2007-23 (bundling) (Nov. 30, 2007); Comments of Democracy 21 and Campaign Legal Center on NPRM 2007-23 (bundling) (Supplemental comments) (Sept. 24, 2008); Comments of Democracy 21 and Campaign Legal Center on NPRM 2009-22 (federal election activity) (Nov. 20, 2009); Comments of Democracy 21 and Campaign Legal Center on NPRM 2009-22 (federal election activity) (Jan. 6, 2010); Comments of Democracy 21 and Campaign Legal Center on NPRM 2009-23 (coordination) (Jan. 9, 2010); Comments of Democracy 21 and Campaign Legal Center on NPRM 2009-26 (fundraising events) (Feb. 8, 2010); Comments of Democracy 21 and Campaign Legal Center on NPRM 2010-01 (coordination) (Feb. 24, 2010); Comments of Democracy 21 and Campaign Legal Center on NPRM 2010-01 (coordination) (Supplemental comments) (March 15, 2010); Comments of Democracy 21 and Campaign Legal Center on ANPRM 2011-14 (Internet) (Nov. 14, 2011); Comments of Democracy 21 and Campaign Legal Center on REG 2014-01 (McCutcheon) (Jan. 15, 2015); Comments of Democracy 21 and Campaign Legal Center on REG 2015-04 (independent spending) (Oct. 27, 2015).

BCRA was enacted in 2002. Moreover, they have been active participants in some of the major election-law cases in the last decade,[6] including serving as counsel in the *Shays* line of cases. *See Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004); *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005); *Shays v. FEC*, 424 F. Supp. 100 (D.D.C. 2006). *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008).

In particular, Democracy 21 and CLC have a long history working on the regulations at issue in the *Van Hollen* litigation. In 2007, Democracy 21 and CLC filed lengthy comments on their own behalf on the FEC's notice of rulemaking for the regulations. *See* Exhibit C. And representatives from both organizations testified in the rulemaking hearing. *See* Exhibit D. In 2011, when both organizations served as counsel to Van Hollen in the lawsuit challenging the regulations, their focus always remained on the proper interpretation of the election laws. Democracy 21's press releases, for example, emphasized the merits of the litigation and made virtually no mention of Van Hollen's candidacy for office. *See, e.g.*, Exhibit E; Exhibit F; Exhibit G; Exhibit H. Enclosed with this motion are affidavits by representatives of both Democracy 21 and CLC confirming that their involvement in the litigation was not for the purpose of influencing Van Hollen's election; rather, Van Hollen served as plaintiff to guarantee standing under D.C. Circuit law and thus avoid any potential jurisdictional issues that might have otherwise hindered Democracy 21 and CLC's efforts to pursue a legal challenge to the

[6] *See, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1478 (2014) (Breyer, J., dissenting) (citing CLC brief for proposition that joint fundraising committees and intra-party transfers allow "candidates, parties, and party supporters" to "avoid[] the base contribution limits"); *National Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 18 (D.C. Cir. 2009) (citing CLC and Democracy 21 brief to counter "straw man" arguments that lobbying disclosure law cannot permissibly cover lobbying association because law is underinclusive); *Independence Institute v. FEC*, 70 F. Supp. 3d 502, 509 & n.12 (D.D.C. 2014) (citing CLC and Democracy 21 brief in rejecting argument that election disclosure requirements should be different for section 501(c)(3) organizations and section 501(c)(4) organizations), *rev'd and vacated*, 816 F.3d 113 (D.C. Cir. 2016); *McCutcheon v. FEC*, 893 F. Supp. 2d 133, 136 n.1 (D.D.C. 2012) ("As amici Campaign Legal Center and Democracy 21 explain, because primary and general elections held during the same calendar year count as separate elections, 11 C.F.R. §§ 100.2, 110.1(j), an individual might contribute $5,000 to each of a party's House and Senate candidates, $30,800 to each of a party's three federal party committees each year, and $10,000 to each of a party's fifty state committees a year."), *rev'd and remanded*, 134 S. Ct. 1434 (2014).

regulations at issue. Exhibit I; Exhibit J. The totality of circumstances—the organizations' mission, their historical role in advocating for campaign finance reform, and their particular conduct surrounding the FEC regulations at issue here—would compel any objective observer to conclude that Democracy 21 and CLC did not provide these pro bono legal services "for the purpose of influencing any election for Federal office." § 8(a)(i).

3. The litigation and rulemaking have a "significant non-election related" aspect

In assessing the "purpose" of a challenged activity, the Commission also considers whether the "activity in question ... appear[s] to have any specific and significant non-election related aspect that might distinguish it from election influencing activity." AO 1983-12. In that advisory opinion, for example, a political committee requested guidance on whether it could run television commercials with footage of incumbent U.S. senators and a message congratulating the citizens of the incumbents' states for having elected that senator. The Commission ruled that such commercials were in-kind contributions in part because the committee had failed to identify any specific and significant non-election related aspect. And it distinguished such activities from: (1) a Congressman hosting a public-affairs discussion program, which served the non-election purpose of serving the "duties of a Federal officeholder" (AO 1981-37); (2) a candidate's television advertisements appealing for funds for a charitable organization, which served the principal purpose of helping the organization, not the candidate (AO 1978-88); and (3) a candidate's radio shows, which served the purpose of his basic employment with the broadcast station (AO 1977-42). In all three examples, the "non-election related aspect" was apparent to the Commission.

The same should be true here, as the "non-election related aspect" of the rulemaking and legal proceedings predominate over any indirect election-related benefit to Van Hollen that

Cause of Action has alleged. The exclusive goal of both the rulemaking and the litigation is to change the FEC regulations to require greater donor disclosure—not to influence the election of any particular candidate.

C. Cause of Action's Theory of Indirect Benefit is Both Incorrect And Disruptive

Because Cause of Action does not and cannot allege that Democracy 21 or CLC's intent was to influence Van Hollen's election (the relevant inquiry under § 8(a)(i)), it asks the Commission to rule that the challenged activities constitute a contribution because the legal proceedings allegedly resulted in an incidental benefit to Van Hollen as a candidate. Although Cause of Action includes the bare allegation that the pro bono legal services provided a "direct benefit" to Van Hollen's campaign (Compl. ¶ 17), it does not point to anything that could even charitably be described as such. Instead, Cause of Action hints at two sorts of decidedly indirect benefits: First, that Van Hollen may receive a general reputational boost by being associated with the lawsuit. *See, e.g., id.* ¶¶ 32-33. Second, that Van Hollen, in establishing his standing to bring the lawsuit, explained how the regulation at issue could potentially affect him. *See, e.g., id.* ¶ 32 n.54. Both arguments rest on an indirect-benefit theory that is foreclosed by the Commission's past opinions, would be unworkable in practice, and would eliminate the longstanding practice of federal candidates using pro bono legal services in cases of public concern.

1. The FEC has already rejected Cause of Action's indirect, reputation-based argument

Cause of Action appears to rely primarily on the effect of the litigation on Van Hollen's reputation. Citing FEC advisory opinion 1990-05, the Complaint argues that the principal question is "whether the activity in question conferred a recognizable benefit or value to the

candidate." Compl. ¶ 31. It then catalogues Van Hollen's statements in support of campaign finance reform, asserting that "[t]he *pro bono* legal services at issue in this matter, which furthered that policy initiative on Van Hollen's behalf, therefore must be seen for what they are: contributions." *Id.* ¶ 33. By this logic, anything that helps to associate a candidate with a particular policy issue is a campaign "contribution" under § 8(a)(i).

The Commission has squarely rejected Cause of Action's theory that any activity conferring an indirect, reputational benefit necessarily influences a federal election and thus constitutes a "contribution":

> [T]he Commission has recognized that even though certain appearances and activities by candidates may have election related aspects and may indirectly benefit their election campaigns, payments by non-political committee entities to finance such activity will not necessarily be deemed to be for the purpose of influencing an election.

AO 1983-12. Accordingly, the FEC has permitted a candidate to host a public-affairs radio program, cable show, live event, or seminar (e.g., AO 1996-45, 1994-15, 1992-05, 1981-37, 1977-42), to appear in television advertisements endorsing local candidates for office or fundraising for charitable organizations (AO 1982-56, 1978-88), to serve as chair of a political, charitable and issue advocacy organization (*e.g.*, AO 1978-56, 1978-15, 1977-54), and to speak at a college event or PAC fundraiser for an honorarium (*e.g.*, AO 1992-06, 1988-27)—all of which clearly enhance a candidate's reputation. In none of these cases was this benefit considered a basis for treating the underlying activity as a contribution. Thus, Cause of Action's reputation-based theory can be easily rejected as inconsistent with well-established, longstanding FEC practice.

Cause of Action's reliance on FEC advisory opinion 1990-05 is misplaced, given the entirely different set of facts addressed in that opinion. In 1990, self-publication of newsletters

and other media was an emerging trend and raised the possibility that candidates might seek to cloak a classic electioneering activity—pamphleteering—under the guise of press freedom. Notably, the Commission reaffirmed the principle that "indirect[] benefit" to a candidate is insufficient to establish a contribution, declining to find that any of the candidate's existing newsletters were election-related even though all of them presumably provided her with some beneficial exposure to her constituency. *See* AO 1990-05 (citing AO 1983-12). Instead, the Commission offered general guidelines for when a candidate's own press publications may cross the line into being election-related.

That guidance does not support finding election-related activity here. To begin, this case does not involve a candidate's self-publication; it relates to a lawsuit and an administrative proceeding. Instead of Van Hollen distributing the filings to his constituency in Maryland, his lawyers filed them in federal court and in an administrative agency. The audience was the federal judiciary and the Commission, not the Maryland electorate. Those filings also make no reference to Van Hollen's qualifications for public office or to his opponent and do not refer to his views on public policy issues (or those of his opponents). They mention Van Hollen's candidacy for office only in passing, in addressing the court's jurisdiction. FEC advisory opinion 1990-05 confirms that such an indirect benefit does not implicate § 8(a)(i).

2. Van Hollen's standing allegations do not change this analysis

Cause of Action's complaint also refers to certain allegations that Van Hollen included in his complaint for purposes of establishing standing to bring the underlying lawsuit in federal court. *See* Compl. ¶ 32 n.54. Such allegations, however, do not prove anything with respect to whether this litigation should be considered election-influencing activity for purposes of § 8(a)(i).

The inquiries—federal standing and § 8(a)(i)—are distinct. Standing to bring a suit in federal court relates to the *effect* or potential effect on the *plaintiff*, here Van Hollen. *See Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1149 (2009) (describing the "personal stake" a plaintiff must demonstrate in the litigation, including that "he is under threat of suffering 'injury in fact' that is concrete and particularized"). Section 8(a)(i), by contrast, relates to the "*purpose*" of the *donor*. As discussed above, the Commission has rejected an effects-based inquiry to determine whether an activity is a contribution. Van Hollen's standing allegations simply do not bear on the contribution question under § 8(a)(i).

What is more, even if they were the same inquiry, Van Hollen's standing allegations would not suffice to establish a contribution. The two inquiries have very different thresholds. A federal plaintiff need not allege direct injury to establish standing. *See United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973).[7] For example, when Senator McConnell filed his complaint challenging BCRA, he (like Van Hollen) alleged that the BCRA would injure him in his capacity as a "member of Congress, candidate, voter, donor, recipient, fundraiser, and party member." Compl. ¶ 16, *McConnell v. FEC*, No. 02-cv-582, (D.D.C. Mar. 27, 2002), ECF No. 1.[8] That this allegation was sufficient to establish standing does not, absent more, establish a contribution under § 8(a)(i). As the Commission has expressly recognized, "activities [that] ... indirectly benefit ... election campaigns ... will not necessarily be deemed to be for the purpose of influencing an election." AO 1983-12.

[7] In *SCRAP*, the Supreme Court rejected an argument "to limit standing to those who have been 'significantly' affected by agency action" as "fundamentally misconceived." 412 U.S. at 689 n.14. It then catalogued "important interests [that it allowed] to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, a $5 fine and costs, and a $1.50 poll tax." *Id.*

[8] Additionally, when Senator McConnell requested (and received) oral argument time in *McCutcheon v. FEC*, he asserted that he was harmed by the aggregate limit on individual contributions. *See* Motion Of Sen. Mitch McConnell For Leave To Participate In Oral Argument As Amicus Curiae And For Divided Oral Argument at 2, *McCutcheon v. FEC*, No. 12-536 (U.S. filed July 25, 2013) ("Now seeking re-election to his sixth term in the Senate, Senator McConnell is adversely impacted by the aggregate limit on individual contributions to candidates.").

Finally, even though Van Hollen alleged that the current campaign finance scheme causes him Article III injury, that allegation does not prove that the litigation was for the purpose of influencing a Federal election under § 8(a)(i). The litigation could not have provided Van Hollen with an electoral advantage over an opponent because Van Hollen's stated interest—"participating in elections untainted by expenditures from undisclosed sources for 'electioneering communications'" (Exhibit K, ¶ 11)—is shared by any candidate for Federal office. If the lawsuit were successful, *all* candidates would benefit from the ruling. Indeed, the allegations were drafted to comply with the D.C. Circuit's standing rules, which permit candidates to bring challenges to the illegal structuring of a competitive environment. *See Shays v. FEC*, 414 F.3d at 85. And, as explained above, such structural challenges are not for the purpose of influencing an election.[9]

3. A Contrary Ruling By The FEC Would Be Highly Disruptive

Cause of Action's complaint, if deemed valid, would call into question settled practices in the area of campaign finance litigation. As noted, there is a long history of members of Congress using pro bono legal services to challenge campaign finance laws and regulations. A ruling that such services are "contributions" would, in practical terms, eliminate this practice. The prohibitive cost of such legal work would make it highly unlikely that elected officials could challenge campaign finance laws and regulations. And the social cost would be to reduce the quality of legal representation in the important legal proceedings that shape how campaign-finance law develops in this country.

[9] Cause of Action also suggests, in a footnote, that Van Hollen violated the House ethics rules in accepting the pro bono legal services without establishing a legal expense fund. Compl. ¶ 23 b.34. The House Committee on Ethics has made clear, however, that House members may accept "pro bono legal assistance ... without limit" "[t]o participate in a civil action challenging the validity of any federal law or regulation." House Committee on Ethics, *Contributions To A Legal Expense Fund*, http://ethics.house.gov/contributions-legal-expense-fund (last visited May 9, 2016). In any event, the Commission does not have jurisdiction over the enforcement of congressional ethics rules.

Indeed, if adopted, the disruptive effect of Cause of Action's argument would extend far beyond pro bono legal representation. Accepting the indirect-benefit theory would permit complaints charging that any activity placing the candidate in a positive light is a "contribution"—which is effectively *everything* a candidate does. Not only would that cause a flood of FEC complaints, it would seriously imperil many socially beneficial activities in which federal officials engage. To consider just one example, such a ruling would call into question the routine practice of U.S. Senators and Members of Congress filing amicus briefs in the courts of appeals and the Supreme Court. Such pro bono amicus briefs are permitted by Congressional rules, but—under Cause of Action's theory of indirect benefit—they would be "contributions" under § 8(a)(i). If the Commission were to accept Cause of Action's theory, few members of Congress would ever offer their views, as amicus curiae, to any court in the country.

Worse yet, Cause of Action's indirect-benefit theory is entirely unworkable. There is no administrable standard to determine which indirect benefits are sufficient to convert an activity into a campaign contribution and which are not. And even were such a standard to exist, it would raise fundamental fairness concerns because it would rely on *ex post facto* decisionmaking; an activity could be deemed a "contribution" if, despite the donor's lack of intent at the time of the activity, many months later, it provides sufficient benefit to a federal candidate. The Commission should not accept Cause of Action's invitation to overrule its prior conclusion that indirect benefit is insufficient to establish a "contribution" under § 8(a)(i).

II. DEMOCRACY 21 AND CLC'S PRO BONO LEGAL SERVICES WERE NOT A "CONTRIBUTION" AS DEFINED UNDER § 8(A)(II) OF FECA

The Commission should reject Cause of Action's alternative argument (Compl. ¶ 29) that Democracy 21 and CLC provided a "contribution" to Van Hollen in the form of "payment by

any person of compensation for the personal services of another person which are rendered *to a political committee* without charge for any purpose." 52 U.S.C. § 30101(8)(A)(ii) (emphasis added; hereinafter "§ (8)(a)(ii)").

This argument suffers from a basic flaw. Democracy 21 and CLC provided pro bono legal services to Van Hollen personally, not to his political committee. *See* Exhibit K (complaint listing plaintiff as "Van Hollen," not "Committee To Elect Van Hollen"); *cf.* FEC AO 1988-27 (recognizing distinction between a payment "directly to the speaker ... and not to the speaker's election campaign"). Van Hollen himself was the only plaintiff in the lawsuit and petitioner in the rulemaking; his campaign committee was not a party and had no involvement in either proceeding. Because the underlying litigation and administrative petition were filed in Van Hollen's name, the pro bono legal services are not a contribution under § (8)(a)(ii).

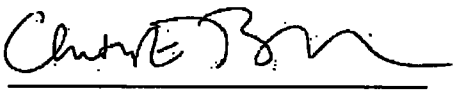
Moreover, in connection with the litigation and rulemaking, Democracy 21 and CLC worked only with Van Hollen personally and his House staff, not with his campaign staff. Exhibit I; Exhibit J. Indeed, Cause of Action's Complaint cites press releases issued by Representative Van Hollen's Congressional office, *not* his campaign committee. *See, e.g.*, Comp. ¶ 32 n.55. Cause of Action's conclusory allegation that Democracy 21 and CLC somehow contributed to Van Hollen's political committee provides no basis for the Commission to initiate an investigation.

CONCLUSION

For the foregoing reasons, the Commission should find no reason to believe that Democracy 21 and CLC violated FECA as alleged in MUR 7024 and should conclude that no further action should be taken in this matter.

May 9, 2016

Respectfully submitted,



Christopher E. Babbitt
Adam Raviv
Kurt G. Kastorf
Arpit K. Garg*
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
Tel: (202) 663-6000
Fax: (202) 663-6363

Attorneys for Democracy 21 and The Campaign Legal Center

* Admitted to practice only in New York. Supervised by members of the firm who are members of the District of Columbia bar.